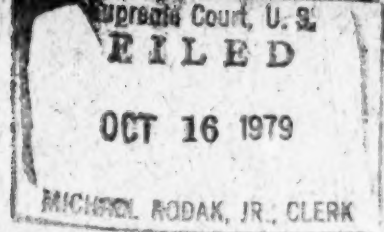


No. 79-328



In the Supreme Court of the United States

OCTOBER TERM, 1979

RAFAEL GOMEZ-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT***

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner contends that immigration authorities abused their discretion in denying his application for suspension of deportation under 8 U.S.C. 1254 on the ground that he failed to show that he would suffer "extreme hardship" as a result of deportation.

1. Petitioner is a native and citizen of Mexico who last entered the United States on December 27, 1973, as a nonimmigrant visitor authorized to remain until January 11, 1974. Petitioner remained in the United States beyond this authorized period.

On October 22, 1974, the District Director of the Immigration and Naturalization Service granted petitioner the privilege of voluntary departure until

November 21, 1974. Petitioner failed to depart within this time, however, and was served with an order to show cause why he should not be deported.

At the deportation hearing on January 6, 1975, petitioner conceded deportability (R. 48) but requested suspension of deportation pursuant to 8 U.S.C. 1254(a)(1). INS conducted an investigation and held another hearing on June 7, 1977. Evidence presented at this hearing revealed that petitioner was a welder earning \$800 per month and that he felt he could obtain similar employment in Mexico (R. 36). When asked what hardship he would face if deported, petitioner replied that he would receive lower wages in Mexico and that his children had become accustomed to the United States (R. 37).

Based on this evidence, the immigration judge denied petitioner's application for suspension of deportation, concluding that petitioner had failed to meet the burden of showing extreme hardship as required under 8 U.S.C. 1254(a)(1) (R. 21c-23).¹ The immigration judge stated (R. 22) (citations omitted):

While respondent has become accustomed to the American way of life, the difference between the economic standards in the United States and other countries cannot be held to command the favorable exercise of discretion.

Difficulty in finding employment and having to return to a country with a lower standard of living is not extreme hardship within the meaning of [8 U.S.C. 1254(a)(1)].

¹The immigration judge further found that petitioner filed no income tax return for 1970 and 1971, that he never filed an address report with INS, and that he never received INS permission to be gainfully employed (R. 21c).

The Board of Immigration Appeals dismissed petitioner's appeal on identical grounds (Pet. App. A-5 to A-8). The court of appeals dismissed a petition for review (*id.* at A-1).

2. Petitioner's contention that he was improperly denied suspension of deportation is not well-founded. Suspension of deportation under 8 U.S.C. 1254(a)(1) is an act of administrative grace and rests in the discretion of the Attorney General and those to whom he has delegated this authority. *Kimm v. Rosenberg*, 363 U.S. 405 (1960); *Jay v. Boyd*, 351 U.S. 345 (1956). Cf. *INS v. Bagamasbad*, 429 U.S. 24 (1976). Whatever the limits of that discretion, it was not abused here.

As the record clearly indicates, petitioner's only proof of extreme hardship was a fear of decreased earnings and a general desire to stay in the United States (R. 37).² A mere showing that one will receive lower wages or less desirable employment in another country does not meet the standard of "extreme hardship" under the statute. *Davidson v. INS*, 558 F. 2d 1361 (9th Cir. 1977); *Pelaez v. INS*, 513 F. 2d 303, 305 (5th Cir. 1975); *Kam Ng v. Pilliod*, 279 F. 2d 207, 210 (7th Cir. 1960) cert. denied, 365 U.S. 860 (1961).³ While petitioner asserts that the

²Petitioner also testified that his children had "gotten used to living here" (R. 37). But petitioner's children are also deportable aliens (R. 21a-21b, 23), so their desire to stay is of no more significance than his own. Cf. *Urbano de Malaluan v. INS*, 577 F. 2d 589, 594-595 (9th Cir. 1978).

³The rule that an alien seeking suspension of deportation must show more than economic hardship is not arbitrary, as petitioner suggests (Pet. 3-4). Most persons would earn less money outside of the United States. Thus, as the Board of Immigration Appeals recognized, if this alone were sufficient to prove extreme hardship, almost every deportable alien would qualify for relief (Pet. App. A-7).

immigration judge and the Board of Immigration Appeals failed to consider other evidence of hardship in petitioner's favor (Pet. 7), he fails to reveal the nature of that evidence or its effect on the determination of extreme hardship.

Nor is petitioner correct in contending that the refusal to grant suspension in this case conflicts with *Costello v. INS*, 376 U.S. 120 (1964), which, he argues (Pet. 8), requires that doubts about whether an alien would suffer "extreme hardship" through deportation must be resolved in favor of the alien. In *Costello*, the Court held that in determining deportability under Section 241 of the Immigration and Nationality Act of 1952, statutory ambiguities should be resolved in favor of the alien. In the present case, however, there is no question of deportability because petitioner has conceded it (R. 26).⁴

⁴The immigration judge granted petitioner the privilege of voluntary departure until October 29, 1977 (R. 23) and the Board of Immigration Appeals reinstated that privilege for 30 days following its decision (R. 3). Petitioner claims (Pet. 4-5, 7) that INS, in seeking to deport petitioner beyond this period, withdrew its grant of voluntary departure as punishment for taking an appeal to the Fifth Circuit. This claim is without support in the record. INS made no attempt to deport petitioner until his privilege lapsed. Furthermore, the court of appeals stayed its mandate until August 31, 1979, in order to allow petitioner further review. Therefore, petitioner has been permitted to stay in this country well beyond the 30 days originally granted him.

Finally, petitioner asserts (Pet. 4, 10) that the Attorney General's failure to promulgate rules precisely defining when his discretion to suspend deportation will be exercised is a violation of due process. Any such rules would be virtually impossible to promulgate in light of the broad discretion granted the Attorney General and the multitude of circumstances in which it might apply. In any event, the case law should have made it clear to petitioner that his showing of economic hardship would be inadequate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

OCTOBER 1979